ORIGINAL

No. 96-8732

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

VINCENT EDWARDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

21 pp

QUESTIONS PRESENTED

1. Whether a general jury verdict of guilty in a prosecution for a drug conspiracy under 21 U.S.C. 846 that involves more than one drug requires the district court to set a base offense level under the Sentencing Guidelines by considering only the drug that supplies the lowest sentence.

2. Whether the evidence was insufficient to support defendant Tidwell's conviction under 18 U.S.C. 924(c) for using and carrying a weapon during and in relation to a drug trafficking crime.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-8732

VINCENT EDWARDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 105 F.3d 1179.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1997. The petition for a writ of certiorari was filed on April 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to possess with intent to distribute and to distribute

powder cocaine and cocaine base (i.e., "crack" cocaine), in violation of 21 U.S.C. 846. In addition, petitioners Joseph Tidwell, Vincent Edwards, and Reynolds Wintersmith were each convicted on one count of possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Petitioner Joseph Tidwell was also convicted of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c).

Petitioners Karl Fort and Reynolds Wintersmith were sentenced to life imprisonment. Petitioner Joseph Tidwell was sentenced to 252 months' imprisonment on the conspiracy count, a concurrent term of 240 months' imprisonment on the possession count, and a consecutive term of 60 months' imprisonment on the Section 924(c) count. Petitioner Vincent Edwards was sentenced to 120 months' imprisonment on the conspiracy and possession counts, to run concurrently. Petitioner Horace Joiner was sentenced to 126 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A4.

1. Petitioners were members of a conspiracy that, between 1989 and July 28, 1993, distributed powder and crack cocaine, primarily in Rockford, Illinois. The conspiracy was organized and directed by a core group known as "the Mob." Members of the Mob obtained kilogram quantities of powder cocaine, which they resold in smaller quantities, as either powder or crack cocaine. The Mob employed "workers" to sell the drugs and "runners" to keep the workers supplied with drugs. Mob members held weekly meetings to

discuss business, made key decisions by majority vote, and divided profits equally. Gov't C.A. Br. 3-14; see United States v. Evans, 92 F.3d 540, 541-542 (7th Cir. 1996), cert. denied, 117 S. Ct. 404 (1996).

Although in the early years the Mob sold only powder cocaine, beginning in the spring of 1992 the group was primarily involved in sales of crack cocaine. Pet. 4. Members of the Mob created crack cocaine by "cooking" powder cocaine using standard kitchen equipment. Gov't C.A. Br. 3-4, 8-9. The government introduced abundant evidence at trial of the group's involvement in sales of crack cocaine, including testimony of co-conspirators; numerous tape-recorded conversations relating to crack cocaine; several purchases of crack from conspirators by a government informant; seizures of crack from conspirators, including one seizure of almost a kilogram of crack; and the seizure from Mob drug houses of paraphernalia (including crack-coated paper towels and razor blades) relating to the manufacture and distribution of crack. See Gov't C.A. Br. 34-35.

During 1993, petitioner Joseph Tidwell sold Mob-owned cocaine at a housing project in Rockford. On the night of April 30, 1993, the police observed him driving his car with his lights off. When the police signalled him to pull over, Tidwell attempted to elude them. While being pursued, Tidwell threw a napkin containing five small bags of crack cocaine out of the car window. Tidwell was later arrested, and police recovered the napkin with the crack cocaine. In addition, police discovered a loaded .45 caliber semi-

automatic pistol in the glove compartment of Tidwell's car. Gov't C.A. Br. 11-12.

2. A superseding indictment charged 20 defendants, including petitioners, with various drug and weapons offenses. Count 1 of the superseding indictment charged petitioners and others with violating 21 U.S.C. 846 by conspiring "knowingly and intentionally to possess with intent to distribute and to distribute mixtures containing cocaine * * * and cocaine base * * * in violation of Title 21 United States Code, Section 841(a)(1)."

Five defendants pleaded guilty, and the remaining 15 defendants were tried in three groups. Petitioners were tried together in a three-week trial. At the conclusion of the evidence, the trial court instructed the jury that "[t]he defendants * * * are charged in Count 1 of the indictment with conspiring to possess with the intent to distribute and to distribute cocaine and cocaine base." In addition, the jury was instructed that "[t]he government does not have to prove that the alleged conspiracy involved an exact amount of cocaine or cocaine base. * * * However, the government must prove that the conspiracy * * * involved measurable amounts of cocaine or cocaine base." Gov't C.A. Br. 22. The court then gave the jury a general verdict form. The verdict form did not require that the jury specify which drug or drugs petitioners had conspired to distribute. Petitioners did not object to the jury instruction requiring proof of a measurable amount of either cocaine or cocaine base. Nor did they request the use of a special verdict form on Count 1. Pet. App. A2.

After the jury returned a verdict of guilty, the district court held separate sentencing hearings at which it determined, pursuant to Sentencing Guidelines §§ 2D1.1 and 1B1.3(a)(2), the quantities of powder and crack cocaine that should be attributed to each defendant. None of the petitioners contended at his sentencing hearing that the jury's general verdict precluded the district court from considering the quantities of crack cocaine that the participants conspired to possess or distribute.

3. The court of appeals affirmed. Pet. App. A1-A4. The court rejected petitioners' contention, raised for the first time on appeal, that the district court should have imposed sentence as if all of the cocaine in the conspiracy were powder cocaine because the jury's verdict did not unambiguously establish that they sold any crack cocaine. Pet. App. A1-A4.[1]

The court began by noting that "under the Sentencing Guidelines, the judge alone determines which drug was distributed and in what quantity." Pet. App. A2 (citing Witte v. United States, 515 U.S. 389, 410-405 (1995); United States v. Cooper, 39 F.3d 167, 172 (7th Cir. 1994); United States v. Levy, 955 F.2d 1098, 1106 (7th Cir. 1992); Sentencing Guidelines § 1B1.2(d) & Application Note 5). Moreover, the court reasoned that under Sentencing Guidelines § 1B1.3, which requires the judge to take into account relevant conduct outside the offense of conviction,

---

[1] The court of appeals noted that, because of the absence of an objection in the district court, the plain error standard of review applied. The court held, however, that there was "no error, and hence no plain error, in this case." Pet. App. A2.

the judge must "consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment." Therefore, the court continued, "[a] judge * * * may base a sentence on kinds and quantities of drugs that were not considered by the jury." Pet. App. A2. The court added that, "[b]ecause sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal." Id. at A3. Accordingly, the court concluded that "[w]hat a jury believes about which drug the conspirators distributed * * * is not conclusive -- and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options." Ibid.

The court acknowledged that some other courts of appeals have held that, when a jury returns a general verdict on a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if the conspiracy involved only the drug carrying the lowest penalty. Pet. App. A2, citing, inter alia, United States v. Owens, 904 F.2d 411 (8th Cir. 1990); United States v. Bounds, 985 F.2d 188 (5th Cir. 1993); United States v. Pace, 981 F.2d 1123 (10th Cir. 1992). The court concluded, however, that those decisions were incorrect, because they failed to recognize the principle that the judge is responsible for determining the identity and amount of the drug distributed under the Sentencing Guidelines. Pet. App. A2-A4. Accordingly, the court declined to

follow those decisions. Because the court's opinion clarified the existence of a circuit conflict, the panel circulated the opinion to the full court; a majority did not favor a hearing en banc. Id. at A4.

DISCUSSION

1. Petitioner contends (Pet. 8-16) that when a defendant is found guilty by general jury verdict of a conspiracy under 21 U.S.C. 846 charging an agreement involving more than one drug, the sentencing court is required to sentence the defendant based on the drug that yields the lowest sentence or to order a new trial. The court of appeals correctly rejected that claim, holding that, under the Sentencing Guidelines, the type of drug (or drugs) for which the defendant is held accountable is a sentencing factor for the judge, not the jury, to determine. Because the courts of appeals are in conflict on that issue, however, and because the issue is a recurring one in federal drug conspiracy cases, this Court's review is warranted.

a. Section 846, Title 21 United States Code, states:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

A Section 846 conspiracy to violate 21 U.S.C. 841(a) requires proof of an agreement "to manufacture, distribute, or dispense, or to possess with intent to manufacture, distribute or dispense, a controlled substance." 21 U.S.C. 841(a)(1) (emphasis added). There is no requirement that the jury find that any particular controlled substance is involved in the conspiracy in order to

establish the offense.

Because the penalty for a drug conspiracy under Section 846 is the "same" as that prescribed for the object offense of the conspiracy, when the object offense is a violation of Section 841(a)(1), the relevant penalty provisions are found in two sources. First, Section 841(b) generally makes the maximum and minimum sentence depend on the type and quantity of drugs involved in the offense. See 21 U.S.C. 841(b). Second, the Sentencing Guidelines base sentencing ranges not only on the conduct involved in the offense of conviction but also on other relevant conduct. See Sentencing Guidelines § 1B1.3, background ("Conduct that is not formally charged or is not an element of conviction may enter into the determination of the applicable guideline sentencing range. * * * [I]n a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction.") (emphasis added); United States v. Watts, 117 S. Ct. 633 (1997) (per curiam). In a prosecution for drug distribution, or possession with intent to distribute, under Section 841(a)(1), the type and quantity of drugs involved are sentencing factors for the court to determine under Section 841(b) and the Guidelines.[2]

---

[2] See, e.g., United States v. Lewis, 113 F. 3d 487, 492 (3d Cir. 1997) (type of drug); United States v. Cooper, 39 F.3d 167, 172 (7th Cir. 1990) (same); United States v. Lam Kwong-Wah, 966 F.2d 682, 685 (D.C. Cir.) (quantity), cert. denied, 506 U.S. 901 (1992); United States v. Morgan, 835 F.2d 79, 81 (5th Cir. 1987) (same).

The same principle applies in sentencing for conspiracy to violate Section 841(a)(1).

Petitioners' jury was properly instructed on the elements of the conspiracy offense under Section 846. The instructions informed the jury that cocaine and cocaine base are controlled substances and that the government must prove that the conspiracy involved a measurable amount of either drug. Pet. App. A2. The jury's general guilty verdict therefore includes a finding that the defendants conspired to distribute at least one "controlled substance," and it thereby comprehends all of the elements necessary to establish a violation of Section 846. At sentencing, the court had the task of determining what controlled substance was involved in the offense, 21 U.S.C. 841(b), and what conduct was attributable to the defendants under the Sentencing Guidelines' relevant conduct rules, Guidelines § 1B1.3.

In this case, petitioners do not contend that the sentencing court's consideration of crack resulted in sentences that exceeded the applicable maximum term of imprisonment under 21 U.S.C. 841(b), or that were based on an erroneous mandatory minimum term of imprisonment under that provision. Petitioners' base offense levels under the Sentencing Guidelines, however, were increased by the district court's attribution to them of quantities of crack cocaine rather than solely powder. Petitioners suggest (Pet. 9-10) that the jury trial guarantee of the Sixth Amendment requires that the jury, not the judge, determine the type of drugs involved in a multiple-drug conspiracy in violation of 21 U.S.C. 846.

The Sixth Amendment, however, requires only that the jury determine each element of the offense charged beyond a reasonable doubt. United States v. Gaudin, 115 S. Ct. 2310, 2313 (1995). The Sixth Amendment does not require that the jury determine sentencing factors. Libretti v. United States, 116 S. Ct. 356, 367-368 (1995). "[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986). Because the type of drug involved in a drug conspiracy offense is a sentencing factor, not an element of the offense, there is no requirement that the jury must find it. And there is likewise no requirement that the sentencing judge must base petitioners' sentences under the Guidelines on the drug "carrying the lesser punishment." Pet. 8.

b. The decision below conflicts with the decisions of other courts of appeals. In both United States v. Owens, 904 F.2d 411 (8th Cir. 1990), and United States v. Pace, 981 F.2d 1123 (10th Cir. 1992), cert. denied, 507 U.S. 966 (1993), the defendants were charged with conspiring to traffic in "methamphetamine/amphetamine" under 21 U.S.C. 846. The juries in each case returned a general verdict that did not specify which drug was involved in the conspiracy. The district courts found that the conspiracy involved methamphetamine, and consequently sentenced the defendants under the Sentencing Guidelines to longer terms of imprisonment than would have been prescribed if the drug had been found to be amphetamine. The courts of appeals vacated the sentences, concluding that the defendants should have been sentenced based on

the drug yielding the less severe penalty. Owens, 904 F.2d at 415; Pace, 981 F.2d at 1130. Both courts of appeals rested their holdings on the fact that the jury verdicts did not indicate which drug formed the basis of the convictions.[3] See also United States v. Bush, 70 F.3d 557, 559-563 (10th Cir. 1995) (applying Pace in the context of sentencing following a guilty plea to drug conspiracy), cert. denied, 116 S. Ct. 795 (1996).

The Fifth Circuit has followed the same approach. In United States v. Bounds, 985 F.2d 188 (5th Cir.), cert. denied, 510 U.S. 845 (1993), the jury had found the defendant guilty of a charge of conspiring to manufacture amphetamine or phenylacetone, without specifying which drug. The district court imposed sentence "based on the theoretical amount of amphetamine producible with the amount of chemicals recovered." Id. at 194. The court of appeals reversed, stating that "[b]ecause we cannot tell which drug the jury focused upon in convicting Bounds, we [must] remand for resentencing," based on the drug yielding the lower base offense level. Id. at 195.[4]

---

[3] In Pace, as here, the defendants did not object to the use of a general verdict or contend at sentencing that the district court could not use the drug leading to the higher base offense level. Nonetheless, the court of appeals concluded that the district court committed "plain error." 981 F.2d at 1128. Thus, even if the court of appeals in this case had relied on the plain error rule in rejecting petitioners' claims, which it did not (see note 1, supra), the result here would still conflict with Pace.

[4] Petitioners also rely (Pet. 8-10) on United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994), and United States v. Orozco-Prada, 732 F.2d 1076, 1083 (2d Cir.), cert. denied, 469 U.S. 845 (1984). In Garcia, the jury returned a general guilty verdict on one count of conspiracy under 21 U.S.C. 846 to violate both 21 U.S.C. 841(a)(1) and 21 U.S.C. 843(b). The court of appeals held

c. The circuit conflict on the conspiracy sentencing issue in this case warrants this Court's review. Many federal drug prosecutions involve conspiracies to distribute more than one narcotic substance, and it will often be impossible to discern from a general verdict of guilty which narcotic formed the basis of the jury's verdict.[5] Because the type of drug involved can have a

---

that the object offense is a "necessary element" of the crime. 37 F.3d at 1370. Because there was no special verdict, the court held that the government was required to consent to sentencing on the basis of the object offense carrying the lower maximum term or to retry the defendant. Id. at 1371. Garcia is inapposite here. The question in Garcia -- whether the object offense in a multiple-object Section 846 conspiracy is a sentencing factor or a "necessary element" of the offense -- is distinct from the question in this case, which is whether, under the Sentencing Guidelines, the judge (rather than the jury) determines the type of drugs to be considered in sentencing defendants found guilty of a Section 846 conspiracy to violate Section 841(a).

In Orozco-Prada, the court of appeals held, in a pre-Guidelines case, that when there is a general jury verdict in a drug conspiracy charge involving both marijuana and cocaine, a sentencing court cannot impose sentence based on a finding that the conspiracy involved cocaine, when such a sentence exceeds the statutory maximum applicable to a conspiracy involving only marijuana. 732 F.2d at 1083-1084 (relying on the "problem in ascertaining juror intent" on whether the conspiracy was marijuana-related or cocaine-related). Although we disagree with Orozco-Prada, it does not assist petitioners because they do not contend that their sentences exceeded the applicable maximum term under Section 841(b).

[5] In some cases, it may be possible to draw such an inference. In this case, for example, the government argued that the court of appeals could infer that the jury found a conspiracy involving crack cocaine because several of the co-conspirators were found guilty of substantive crack cocaine offenses in violation of Section 841(a) and because the evidence at trial overwhelmingly established that the conspiracy involved crack cocaine. See Gov't C.A. Br. 33-35 (citing United States v. Peters, 617 F.2d 503, 506 (7th Cir. 1990); United States v. Dennis, 786 F.2d 1029, 1040 (11th Cir. 1986), cert. denied, 481 U.S. 1037 (1987)). The court of appeals did not reach that contention. Even if that analysis were available to interpret the jury's verdict in some cases, however, it will not always be available.

significant impact on a conspiracy defendant's ultimate sentence, the disparate approaches in the circuits could produce sizeable variations in imprisonment terms.

The disparate approaches do not flow from divergent interpretations of the Sentencing Guidelines. Although Owens, Pace, and Bounds involve Guidelines sentencing issues, those cases have applied general principles requiring a jury to find the object in a conspiracy case in order for the judge to sentence based on that object. The source of those principles is unclear. But because such a rule rests on principles that are not found in the Guidelines (or within the Commission's authority to modify), it is unlikely that action by the Sentencing Commission could alleviate the conflict.[6]

The government has on some occasions circumvented the single-conspiracy sentencing rule applied in the Fifth, Eighth, and Tenth Circuits by dividing conspiracy charges into several counts based on type of drug involved. When a single conspiracy in fact embraces several different drugs, however, that approach unnecessarily complicates the charges in an indictment. Several courts have suggested that the government may avoid the requirement

---

[6] The Sentencing Commission's effort to channel the judge's findings at sentencing in multiple-object conspiracy cases when the jury verdict does not make clear which object offense the defendant conspired to commit (see Guidelines § 1B1.2(d), Application Note 5) has generated some controversy. See United States v. Malpeso, 115 F.3d 155, 167-168 (2d Cir. 1997) (noting differing views over the constitutionality of the Commission's approach; concluding that where the maximum sentence is not affected, "[t]he sentencing court's determinations on the objects of a multi-object conspiracy do not constitute criminal verdicts, such that a defendant's Sixth Amendment rights are violated").

of sentencing for a single conspiracy based on the drug carrying the lowest penalty by the use of special verdicts. See Bounds, 985 F.2d at 195; Owens, 904 F.2d at 415. While the government has sometimes employed that approach, "as a general rule special verdicts are disfavored in criminal cases," United States v. Buishas, 791 F.2d 1310, 1317 (7th Cir. 1986); see United States v. Wilson, 629 F.2d 439, 442-444 (6th Cir. 1980). More importantly, determining the type of drug or drugs to be included in relevant conduct under the Sentencing Guidelines is a task for the judge, not the jury. There is no warrant for employing special verdicts in this context to transfer that task to the jury.

2. Petitioner Joseph Tidwell also contends that the evidence was insufficient under 18 U.S.C. 924(c) to show that he was "carrying" the weapon found in the glove compartment of his car because the glove compartment may have been locked. Pet. 16-17. At trial, Tidwell acknowledged that he was "carrying guns or a gun" during the conspiracy, but contended that it was for protection because of his brother's involvement in drug trafficking. Gov't C.A. Br. 51. In his reply brief on appeal, however, Tidwell contended that the gun in his glove compartment was not carried because it may not have been "'within reasonable reach'" and "'available for immediate use.'" Tidwell Reply Br. at 2-3, quoting United States v. Baker, 78 F.3d 1241 (7th Cir. 1996), cert. denied, 117 S. Ct. 1720 (1997).

That argument warrants no further review. Numerous courts of appeals have correctly held that evidence that a defendant

transported a gun in the glove compartment of a car is sufficient to sustain a conviction for "carr[ying]" under Section 924(c)(1), United States v. Barry, 98 F.3d 373, 377 (8th Cir. 1996), 117 S. Ct. 1014 (1997); United States v. Staples, 85 F.3d 461, 464 (9th Cir.), cert. denied, 117 S. Ct. 318 (1996); United States v. Farris, 77 F.3d 391, 395-396 (11th Cir.), cert. denied, 117 S. Ct. 241 (1996), even where the glove compartment is locked, United States v. Muscarello, 106 F.3d 636, 639 (5th Cir. 1997), petition for cert. pending, No. 96-1654. There is disagreement among the courts of appeals on whether proof of carrying under Section 924(c) requires a showing of "immediate accessibility" when a defendant transports a gun in a vehicle. See U.S. Br. in Opp. in Muscarello v. United States, No. 96-1654, at 1-13. But for the reasons given in our brief in Muscarello, the conflict does not warrant this Court's review at present.[7]

Nor is there any merit to Tidwell's reliance on Bailey v. United States, 116 S. Ct. 501 (1995). Pet. 16-17. Bailey did not construe the "carry" element of Section 924(c); it construed the "use" element. The jury instructions in this case on "use" are not inconsistent with Bailey. The instructions informed the jury, without more, that it could find Tidwell guilty if it found that he

---

[7] We have provided petitioners in this case with a copy of our brief in opposition in Muscarello. As we noted in that brief and in a supplemental letter (also being served on petitioners here), only three courts of appeals have espoused the "immediate accessibility" test, two of which have granted the government's suggestions for rehearing en banc on that issue. Thus, the conflict may be resolved without the need for this Court's intervention.

"knowingly used or carried a firearm during and in relation to" the drug offense. Gov't C.A. Br. 50. Although Tidwell now suggests (Pet. 17) that he must be granted a new trial because the jury could have returned a proper verdict on "carrying" only if it were instructed to consider whether the gun was "within the defendant's reach and available for immediate use," Tidwell never requested such an instruction below; rather, Tidwell (through counsel) admitted to "carrying" a gun. There is thus no plain error warranting a new trial. See Johnson v. United States, 117 S. Ct. 1544 (1997).

CONCLUSION

As to the first question presented, the petition for a writ of certiorari should be granted. In all other respects, the petition should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

JULY 1997

96-8732

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No.

VINCENT EDWARDS, KARL V. FORT, REYNOLDS A. WINTERSMITH, HORACE JOINER, AND JOSEPH TIDWELL
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioners, Vincent Edwards, Karl V. Fort, Reynolds A. Wintersmith, Horace Joiner, and Joseph Tidwell, by and through their respective attorneys, move pursuant to Supreme Court Rule 39.1, for leave to proceed in forma pauperis before this Court. In support of the motion, the Petitioners further state that the Petitioners have, under the Criminal Justice Act of 1964 (18 U.S.C. § 3006A), been represented by appointed counsel throughout the proceedings below and remain without sufficient funds to afford counsel or payment of costs. Attached hereto are affidavits of each of petitioners' counsel verifying their appointments under the Criminal Justice Act.

WHEREFORE petitioners respectfully pray that an order be entered granting petitioners leave to proceed in forma pauperis.

Steven Shobat
Counsel of Record

Steven Shobat
321 South Plymouth Court, Suite 1275
Chicago, Illinois 60604
(312) 922-8480

(9)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	Appeal form the United States District Court for the Northern District of Illinois-Western Division
v.	)	94-3952
	)	No. 93-CR-20024
HORACE JOINER Defendant-Appellant	)	Hon. Philip G. Reinhard, Judge

STATE OF ILLINOIS)
) ss AFFIDAVIT
COUNTY OF WINNEBAGO)

DONALD P. SULLIVAN, being first duly sworn upon oath, swears, avers and avows:

1. My name is DONALD P. SULLIVAN.

2. I am licensed to practice law in the State of Illinois in the District Court of the Northern District of Illinois, Western Division, and before the Seventh Circuit Appellate Court.

3. I was appointed to represent the defendant, HORACE JOINER, at the trial at the District Court and on appeal before the Seventh Circuit Court of Appeals, pursuant to and under the provisions of the Criminal Justice Act.

Further Affiant Sayeth Not.

DONALD P. SULLIVAN

SUBSCRIBED and SWORN to before me this 4th day of February 1997

"OFFICIAL SEAL"
TERESA D. POWERS
Notary Public, State of Illinois
My Commission Expires 07/21/00

Notary Public

DECLARATION OF MARK D. DE BOFSKY

Mark D. DeBofsky, declares as follows:

On January 6, 1995, I was appointed by the United State Court of Appeals for the Seventh Circuit, pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(d)(2), as counsel on appeal for Reynolds A. Wintersmith, appellant in case No. 94-3833.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/4/97

Mark D. DeBofsky